Children and Family Law Program
Committee for Public Counsel Services

Recent Developments
(November 2001 – November 2002)

Remember, always Shepardize! Applications for further appellate review may have been granted after the publication date of these case summaries. Furthermore, opinions may be "amended," sua sponte, or upon motion of a party.

Cases

ADOPTION – DISPENSING WITH PARENTAL CONSENT, AGREEMENT FOR JUDGMENT

Adoption of John, 53 Mass. App. Ct. 431 (2001) – Duffly, Kantrowitz, McHugh. See Visitation - Post-Adoption Visitation.

The Appeals Court upheld the mother's agreement to dispense with her consent to adoption. During trial the parties entered into an agreement for judgment. The parties acknowledged that it was in the child's best interests for one of two uncles to adopt him or be his guardian. The parties agreed that the only determinations left for the court were which placement served the child's best interests and whether the child should have post-adoption contact with his parents. During the trial, the judge conducted a colloquy with mother. He inquired about her understanding of the consequences of having the judgment enter and about whether she had voluntarily given her consent to this disposition. The judge found that the mother's actions were knowing and voluntary. After the trial the judge determined that adoption by the maternal uncle was in the child's best interests.

The Appeals Court affirmed the right of parties to voluntarily settle a termination of parental rights case with an agreement for judgment, even in the absence of an admission of unfitness. Id. at 438. The Court spelled out the trial court's obligation in cases involving agreements for judgment and distinguished them from its obligations in a *contested* proceeding. In contested cases there must be clear and convincing evidence of parental unfitness detailed in written findings. Id. at 436-37 (citing Santosky v. Kramer, 455 U.S. 745 (1982 and Adoption of Hugo, 428 Mass. 219 (1998)). Decrees based on stipulations for judgment are valid when (1) the judge makes findings that the decree is in the child's best interests, (2) inquiry by the judge establishes that parental consent to judgment was knowing and voluntary, and (3) the judge determines that there is a factual basis for terminating parental rights. Id. at 437. The latter is required to insure that DSS's decision to seek termination was well-founded. Id. at 436. The court rejected mother's assertions that agreements for judgment had to be in the form of an adoption surrender set forth in G.L. c. 210, § 2, and that, like in criminal cases, mother should have been asked if she knowingly and intelligently waived her appellate rights. Id. at 434-436.

ADOPTION – DISPENSING WITH PARENTAL CONSENT, COMPETING PLANS

Adoption of Peggy, 436 Mass. 690 (2002) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See – Appellate Practice – Preservation Of Appellate Issues; Due Process – Subpoena for Child Witness; Evidence – Hearsay; Evidence – Hearsay, Medical & Hospital Records; Jurisdiction – Foreign Nationals; Parental Unfitness – Sufficiency Of The Evidence.

The SJC affirmed the trial judge's finding that the child's best interests were served by adoption by her foster parents instead of placement with the child's grandmother in India. Id. at 704-705. Although, the child previously had a close relationship with her

grandmother, the five year old child had been separated from the grandmother for nearly two years. Id. Further, the foster parents had demonstrated the ability to meet the child's special needs and she had become an integral part of the family. Id. Even the father's expert, presented with a hypothetical scenario mirroring the child's situation, agreed that separating the child from her foster family would cause significant harm. Id.

Adoption of Irene, 54 Mass. App. Ct. 613 (2002) – Smith, Cypher and Cowin.

The child and DSS appealed from a judgment approving a plan put forward by the mother for adoption of the child by the maternal grandmother. Concluding that the trial judge abused his discretion in finding that adoption by the grandmother was in the child's best interest, the Appeals Court vacated so much of the decree that approved the mother's plan, found that the Department's plan was in the child's best interest and ordered that a decree enter approving the department's plan of adoption by the child's foster parents. Id. at 623.

The Appeals Court held that many of the judge's subsidiary findings were either directly contradicted by, or not supported by the evidence. Id. at 621-622. Also, the judge's findings ignored important evidence regarding the child's fragile emotional state. Id. at 621. Even assuming that the subsidiary findings were not defective, the trial judge's ultimate conclusion that adoption by the grandmother was in the child's best interests was still an abuse of discretion. Id. The Appeals Court was also troubled that the judge inexplicably dispensed with the requirement of G.L. c. 119, § 26(2)(i) that potential custodians either be studied by a probation officer or other person designated by the court. Id. at 620-21. The Appeals Court also found error in the judge's exclusion of reports concerning the grandmother filed pursuant to G.L. c. 119, § 51A and 51B, that were relevant to her parenting. Id. at 620.

While recognizing that "a biological and/or cultural match between a child and caretaker is a desirable aim," the Appeals Court said it is just one factor and cannot justify an otherwise inappropriate placement. Id. at 622-23. Here, the grandmother had not completed a home study, did not fulfill her obligation to cooperate with the home study process, did not know the child, did not understand the child's special needs, and had a questionable parenting history. Id. at 619, 622. In contrast, the evidence supported a finding that adoption by the foster parents was in the child's best interest. The child had lived with them successfully from age five months to age two years, they had complied with all requirements and recommendations regarding the child's disabilities and were making progress in overcoming her developmental delays, the child was attached to them and there was evidence that a move would compromise the child's ability to cope with her delays. Id. at 614, 615, 623.

Accordingly, the Appeals Court vacated the order giving custody to the grandmother and, finding that nothing would be gained by a remand, ordered that a decree enter approving the DSS plan. Id. at 623.

ADOPTION – DISPENSING WITH PARENTAL CONSENT, CONFLICT OF INTEREST

Adoption of Natasha, 53 Mass. App. Ct. 441 (2001) – Brown, Cypher, Kafker.

See Conflict of Interest – Department of Social Services.

APPELLATE PRACTICE – DISMISSAL OF APPEAL, MOOTNESS

Adoption of Olivia, 53 Mass. App. Ct. 670 (2002) – Gillerman, Cypher, Cohen. See Counsel – Right to Counsel; Parental Unfitness, Sufficiency of Evidence.

The decision of the probate court dispensing with the father's consent to adoption of his children rendered moot his appeal of a juvenile court order terminating his rights to visitation in an earlier care and protection case. Id. at 678.

APPELLATE PRACTICE – JURISDICTION OF TRIAL COURT ONCE APPEAL DOCKETED

Commonwealth v. Montgomery, 53 Mass. App. Ct. 350 (2002) – Armstrong, Lenk, Rapoza.

Once an appeal has been docketed in the Appeals Court, the trial court does not have jurisdiction to act on motions to attack the judgment (e.g., motion for new trial, motion to vacate or amend the judgment). Id. at 351-352. A party wishing to file such a motion must first file a motion in the Appeals Court for a stay of the appeal pending disposition of the motion in the trial court. Id. at 353. In deciding whether to grant the motion, a single justice of the Appeals Court will consider "whether the interests of fairness, balanced with the interests of judicial economy, best will be served by giving priority to a trial court resolution" of the case. Factors favoring granting of a stay include the likelihood that the trial court will grant the motion, the economy of consolidating the direct appeal with an appeal of the denial of the posttrial motion, the benefit to the party of consolidating the appeals, and the benefit of an earlier retrial. Id. at 354. A stay is less likely to be granted where similar issues are raised by the direct appeal and posttrial motion, and when briefing is completed and the case is ready for argument. Id.

PRACTICE TIP: Note that prior leave of the Appeals Court is not required for the trial court to enter orders pursuant to a review and redetermination under G.L. c. 119, §26.

Custody of Deborah, 33 Mass. App. Ct. 913, 914 (1992). However, counsel should inform the Appeals Court of any further orders, in the event it renders moot all or part of the appeal. Id. Presumably, the same procedure applies to orders entered as a result of permanency hearings under G.L. c.119, §29. Less clear is the procedure to be followed for other posttrial proceedings such as abuse of discretion hearings or motions regarding visitation that may affect the judgment. The best practice is for trial counsel to keep in close contact with the CAFL appellate attorney regarding the status of posttrial proceedings and seek guidance from the appellate attorney as necessary. Feel free to call the CAFL administrative office if you have any questions about whether in a particular case you need to seek leave from the Appeals Court.

APPELLATE PRACTICE – PRESERVATION OF APPELLATE ISSUES

Adoption of Peggy, 436 Mass. 690 (2002) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Adoption – Dispensing With Parental Consent, Competing Plans; Due Process – Subpoena for Child Witness; Evidence – Hearsay; Evidence – Hearsay, Medical & Hospital Records; Jurisdiction – Foreign Nationals; Parental Unfitness – Sufficiency Of The Evidence.

Challenges to subject matter jurisdiction are nonwaivable and may be raised at any time. Id. at 696. Thus, even though it was not raised at trial, the SJC considered father's argument that the juvenile court lacked jurisdiction to terminate the parental rights of a foreign national living in Massachusetts on a temporary work visa. Id.

Care and Protection of Georgette, 54 Mass. App. Ct. 778, further app. rev. granted in part, 437 Mass. 1110 (2002) -- Porada, Laurence, Kafker. See Evidence – Extrajudicial Information; Parental Unfitness – Sufficiency of the Evidence; Visitation – Post-Trial Visitation.

[**Note**: The SJC is reviewing other issues raised by Georgette concerning the role of child's counsel, conflicts of interest in the representation of multiple clients, and standards for relief from ineffective assistance of counsel. See the winter 2003 CAFL newsletter for a discussion of those issues. The portions of Georgette discussed in these case summaries will not be reviewed by the SJC.]

In Georgette, the father argued that the trial judge had improperly relied on extrajudicial information based on comments the judge made on the first day of trial that he had prepared by spending several hours reading documents related to the case. The Appeals Court held that father waived this argument because he did not raise it at trial. Id. at 782. "This is not such an exceptional case (given the overwhelming evidence of the father's unfitness and his untrammeled opportunity to have preserved the issue below) that in our discretion it is worthy of review to avoid injustice or provide assistance for other cases." Id. at 782 n.6 (citing Petition of the Dept. of Social Servs. to Dispense with Consent to Adoption, 392 Mass. 696, 697 (1984; Atlas Tack Corp. v. DiMasi, 37 Mass. App. Ct. 66, 70-71 (1994).

APPELLATE PRACTICE – TIMELINESS OF NOTICE OF APPEAL

G.D. Mathews & Sons Corp. v. MSN Corp., 54 Mass. App. Ct. 18 (2002) – Armstrong, Dreben, Mills.

Entries on the docket sheet reflected two different dates for entry of the judgment. If the latter date was used, the notice of appeal was timely filed; if the earlier date was used, the notice of appeal was late by one day. The Appeals Court held that since the error was caused by the court, not by the appealing party, and there was no unfair prejudice to the opposing party, the notice of appeal should be treated as timely. Id. at 25. "As applied to appeals, our court has spoken of the evolving rule that a procedural tangle having its origin in a failure by the court – here we may include the court clerk – to observe the mandates of rules will generally be resolved in favor of preserving rights of appeal where this result is technically possible and does not work unfair prejudice to other parties." Id. (citations omitted).

CARE AND PROTECTION

In re Care and Protection Summons, 437 Mass 224 (2002) -- Marshall, Greaney, Spina, Sosman, Cordy. See Contempt; Evidence – Findings From Earlier Proceeding; Judicial Impartiality; Trial Practice - Oath.

The SJC affirmed two judgments of contempt resulting from the parents' refusal to comply with summonses to bring their infant to court. The parents argued that the mother had suffered a miscarriage and there was no child to bring before the judge for identification in the care and protection proceeding. The SJC held that DSS proved by a fair preponderance of the evidence that the mother had given birth to a child that may be in need of care and protection. Id. at 235. DSS presented evidence of the mother's pregnancy and other evidence that supported a finding that the child had been born alive. Further, at the seventy-two hour hearing, the parents refused to testify and invoked their privilege against self-incrimination in any case concerning "some harm" or "some abuse" to the child. Id. This position was inconsistent with their later claim that the mother had a miscarriage, and the judge was not required to credit this later testimony. Id. at 235-236. Finally, "the judge was entitled to rely, as he did, on his findings in earlier proceedings involving these parents, and to assess their credibility in light of those proceedings." Id. at 235. See Adoption of Fran, 54 Mass. App. Ct. 455 (2002), an earlier termination case involving the parents' three older children, and Adoption of Darla, 56 Mass. App. Ct. 519 (2002) , a later case concerning another sibling.

CONFLICT OF INTEREST, DEPARMENT OF SOCIAL SERVICES

Adoption of Natasha, 53 Mass. App. Ct. 441 (2001) – Brown, Cypher, Kafker.

A mother appealed from a judgment dispensing with parental consent to the adoption of her three children, arguing that her trial was fatally flawed because the pre-adoptive mother for one of the children was a supervisor in the same DSS office from which the mother received case management services. Before trial, mother moved to dismiss the petition based on DSS's failure to comply with its regulation prohibiting placement of children with DSS employees in offices serving them. The trial court denied the motion, ruling that DSS's actions were a "minor technical violation." Id. at 442-43. DSS subsequently transferred the adoption case management to Catholic Charities, but the DSS area office continued to service the mother. On appeal, mother sought a remand, the disqualification of DSS from the case, and appointment of a private agency to investigate and prosecute the petition.

The Appeals Court was troubled by DSS's disregard of its own regulation, 110 C.M.R. 7.106(3), as well as protocols established by the SJC in Petition of the Dept. of Social Servs. to Dispense with Consent to Adoption, 384 Mass. 707, 710-713 (1981). In that case the SJC acknowledged DSS's extraordinary capacity to interfere with families and that, as a result, it must avoid even the appearance of impropriety. Natasha, 53 Mass. App. Ct. at 448. When a DSS employee wishes to adopt a child from the same area office, DSS should disqualify itself, and another agency should be appointed to investigate and prosecute the petition. Id. Nevertheless, the Appeals Court concluded that a remand was not warranted in this case because (1) there was overwhelming evidence of parental unfitness; (2) the mother had failed to ask for disqualification prior to trial; (3) the mother had an opportunity to cross-examine the DSS workers to show bias; (4) a retrial would further delay resolution for the children; and (5) even at a retrial the judge would still have to consider documents and testimony of DSS. Id. at 450-451. However, the Court noted that in other circumstances, a remand may be required. Id. at 451 n.16.

Mother's claim that her trial counsel provided ineffective assistance by arguing for dismissal rather than disqualification of DSS as petitioner was without merit. Given the clear and convincing evidence of mother's unfitness, the review of the supervisor's suitability as an adoptive parent by outside agencies, and the needs of the children for permanence, the result of this case would have been the same notwithstanding trial counsel's alleged failures. Id. at 453.

Because of the conflict of interest, the Appeals Court subjected the evidence of parental unfitness to an "extra measure of evidentiary protection." Id. at 451. Nevertheless, much of that evidence was either uncontested or provided by witnesses outside DSS, including the court investigator, the mother's sister, a clinician and "independent expert Ken Herman." Id. at 451-52. Among other things the Court noted that the mother had gone to prison for assault and battery, she failed to participate consistently in services, she lived with a boyfriend who had been shot and was later incarcerated for drug trafficking, and

on one occasion 5 bullets were shot into her apartment. Id. at 452. Finally, the judge was well aware of DSS' potential bias and was able to give appropriate weight to DSS testimony. Id.

CONFRONTATION OF WITNESSES – CHILD'S TESTIMONY, ALTERNATIVES TO "FACE TO FACE" CONFRONTATION

Adoption of Roni, 56 Mass. App. Ct. 52 (2002) – Brown, Cohen, Green. See Due Process – Delay Of Proceedings, 72-Hour Hearing; Parental Unfitness – Sufficiency Of The Evidence; Reasonable Efforts.

The parents' due process rights were not violated when the trial judge granted children's counsel's motion to exclude the parents from the courtroom during the children's testimony, where the parents' attorneys were present during the testimony and were permitted to cross-examine the children. Id. at 55-57. The constitutional right to confront witnesses does not apply in termination proceedings. Id. at 55 (citing Adoption of Don, 435 Mass. 158, 167-169 (2001)) (right to confront witnesses does not apply in termination proceedings). See also Adoption of Arthur, 34 Mass. App. Ct. 914, 915 (1993) Adoption of Tina, 45 Mass. App. Ct. 727, 734 (1998). However, due process does require that parents have an opportunity to rebut the allegations against them. Roni, 56 Mass. App. Ct. at 55. An order permitting a child to testify outside the presence of her parents should include an explicit finding that the arrangement is necessary to avoid trauma to the child. Id. Although the trial judge made no findings to support her order and provided little explanation on the record, the Appeals Court held that the finding of trauma was implicit from the judge's order. Id. at 55-56. The Court noted that the motion filed by children's counsel was supported by the opinions of the children's therapists. Id. at 56. In reaching its decision, the Appeals Court noted that at trial the parents did not suggest a less intrusive alternative for the taking of the children's testimony, instead simply opposing children's motion. Id. at 57 n.11.

The parents had argued that because they were unable to observe the children's demeanor while testifying, they could not determine areas where the children's testimony lacked credibility and thus could not assist their attorneys in identifying areas for cross-examination. The Appeals Court rejected this argument, noting that the children's testimony concerned incidents of physical abuse by the parents, and the parents did not need to observe their children's demeanor to know whether the testimony was true. Id. at 56-57. Further, the incidents they testified about were previously described in written reports and therefore the parents had ample opportunity to advise their attorneys if any of the claimed incidents did not occur. Id. at 57.

PRACTICE TIP: The Appeals Court noted that argument on the motion to permit the children to testify outside the parent's presence occurred largely in an untranscribed lobby conference. Id. at 56. Whenever possible, counsel should seek to ensure that any substantive proceedings are made part of the record, either by asking that the discussion be recorded, or by requesting that a summary of what was discussed be put on the record.

CONTEMPT

In re Care and Protection Summons, 437 Mass 224 (2002) -- Marshall, Greaney, Spina, Sosman, Cordy. See Care and Protection; Evidence – Findings From Earlier Proceeding; Judicial Impartiality; Trial Practice – Oath.

The SJC affirmed two judgments of contempt resulting from the parents' refusal to comply with summonses to bring their infant to court. The parents argued that they could not be held in contempt because the mother had a miscarriage and there was no child to present for identification. The SJC held that "noncompliance with a judge's valid order may be excused where it becomes impossible, but the burden lies with the parents to prove impossibility." Id. at 237. The judge's finding that there was a live child was not clearly erroneous and the parents offered no evidence to the contrary other than their own testimony (which the judge did not credit). Id. at 237.

The parents also objected to the trial judge's statement that they could purge their contempt by disclosing the alleged burial site of the child on the grounds that it violated their rights against self-incrimination. The SJC disagreed. Id. at 237-238. The judge's remarks were not an order to disclose the burial site, but a statement that more evidence was needed to convince him that the child was not alive. Id. at 238. The parents could have offered any other "weighty and credible" evidence that the mother had miscarried. Id. "The judges' decision that more was needed than the parents' self-serving statement does not amount to government compulsion." Id. at 238 (citing United States v. Rylander, 460 US 752, 758-759 (1983)). The parents' rights against self-incrimination were not violated by the judge's requirement that they present additional evidence to purge their contempt. Id. at 238, (citing United States v. Butler, 211 F.3d 826, 832 (4th Cir. 2000)).

COUNSEL, INEFFECTIVE ASSISTANCE

Adoption of Natasha, 53 Mass. App. Ct. 441 (2001) – Brown, Cypher, Kafker.

See Conflict Of Interest, Department Of Social Services.

COUNSEL, RIGHT TO COUNSEL

Adoption of Olivia, 53 Mass. App. Ct. 670 (2002) – Gillerman, Cypher, Cohen. See Appellate Practice – Dismissal Of Appeal, Mootness; Parental Unfitness, Sufficiency of Evidence.

The Appeals Court held that the trial judge did not abuse her discretion in denying the father's motion for new court-appointed counsel, filed three weeks before trial. Id. at 673. Although parents have a constitutional right to counsel in termination of parental rights cases, they do not have a right to counsel of their choice. Id. at 675. Nevertheless, a motion for substitution of counsel should be allowed if the parent demonstrates good cause, such as a conflict of interest, incompetence, or an irreconcilable breakdown in communication. Id. The father here did not demonstrate good cause. Id. His complaints about his attorney included a perceived lack of meaningful relationship, the attorney's failure to file redundant motions and redundant requests for experts, and the fact that his attorney advised him to agree to an open adoption plan. Id. at 673, 675. The Court noted that the trial judge expressly found that father's attorney was prepared and "implicitly found counsel effective."

The Appeals Court further held that the trial judge properly balanced father's interest in having new counsel appointed with the children's interest in having the trial proceed expeditiously. "In [these] proceedings, the balance to be struck is more complex, requiring courts not only to make an accommodation between the rights of the individual parent and the interest of society but also the rights and needs of the child." Id. at 677 (citations omitted).

The Appeals Court further held that father waived his right to counsel when he chose to represent himself rather than being represented by his current attorney, and that this waiver was knowing, intelligent and voluntary. Id. at 676-67. Refusal to be represented by able appointed counsel without good cause is a voluntary waiver of the right to counsel. Id.

Commonwealth v. Carsetti, 53 Mass. App. Ct. 558 (2002) – Jacobs, Kantrowitz, Kafker.

The Appeals Court held that the trial judge did not abuse his discretion in denying the defendant's request for a continuance made on the day of trial because he wanted new court-appointed counsel. Id. at 563. While a defendant does not have an absolute right to replace one competent attorney with another, he cannot be forced to proceed to trial with an incompetent or unprepared lawyer. Id. at 561. A judge must balance the public's interest in the fair, efficient and orderly administration of justice and the defendant's right to counsel of his choice. Id. at 563. Here the lawyer had ably represented counsel for eight months and was prepared for trial. Id. at 563. The defendant's complaints were largely with counsel's trial tactics. Id. at 562. In addition, the case was a simple one, the witnesses were present, one witness had to leave the state the next day, and it was the only case on trial for the day. Id.

The Court also held that the defendant knowingly and voluntarily waived his right to counsel when he chose to represent himself at the trial. The Court noted that the defendant had a very long history with the criminal justice system and that he made it very clear he did not want to be represented by appointed counsel. Id. at 565. The Court also noted that the defendant's representation of himself was "noteworthy;" he made

appropriate objections and comments, cross-examined the three witnesses, and pointed out inconsistencies in the evidence in his closing argument. Id. at 565 and n.8.

PRACTICE TIP: Note that Adoption of Olivia, 53 Mass. App. Ct. 670, 677 (2002), discussed above, addresses the identical issue in a termination case and requires the trial judge to also consider in the balancing test the child's interest in having the trial proceed expeditiously. Nevertheless, Carsetti provides a helpful road map for judges and lawyers faced with a party's request for new counsel on the eve of trial. First, the Court notes that under the Rules of Professional Conduct, "an appointed lawyer should advise a client seeking to discharge the appointed lawyer of the consequences of such an action, including the possibility that the client may be required to proceed *pro se*." Id. at 560 n.2 (citing Mass. R. Prof. C. 1.16 comment [5]). Second, the lawyer, not the client, is responsible for notifying the court of the need for a continuance. Id. at 560. Third, where the request is made close to the date of trial and it is uncertain whether the court will grant the continuance, the attorney must be prepared for trial. Id. at 560 n.3. Failure to do so might warrant financial sanctions. Id. Fourth, where the client's complaints are concerned with counsel's trial tactics, as opposed to incompetence or lack of preparedness, "this is ordinarily not sufficient to warrant a continuance." Id. at 562. Fifth, the judge should conduct a colloquy regarding the client's exact complaint with counsel, and should inquire of counsel what he has done on the case, whether he is prepared to proceed with trial, and whether there are any other reasons for seeking to withdraw. Id. at 562 and n.6. These inquiries "must be appropriately tempered to protect attorney-client confidentiality. Id. Finally, the judge should make formal findings either in writing or on the record to support his decision. Id. at 563.

COUNSEL, WAIVER OF COUNSEL

Adoption of Olivia, 53 Mass. App. Ct. 670 (2002) – Gillerman, Cypher, Cohen. See also Appellate Practice – Dismissal Of Appeal, Mootness; Parental Unfitness, Sufficiency of Evidence.

See Counsel, Right to Counsel.

Commonwealth v. Carsetti, 53 Mass. App. Ct. 558 (2002) – Jacobs, Kantrowitz, Kafker.

See Counsel, Right to Counsel.

DUE PROCESS – DELAY OF PROCEEDINGS, 72-HOUR HEARING

Adoption of Roni, 56 Mass. App. Ct. 52 (2002) – Brown, Cohen, Green. Confrontation Of Witnesses – Child's Testimony, Alternatives To "Face To Face" Confrontation; Parental Unfitness – Sufficiency Of The Evidence; Reasonable Efforts.

On appeal from a judgment dispensing with her consent to adoption, the mother argued that the parents were denied due process because the 72-hour hearing was not held within the time prescribed by G.L. c.119, §24. The hearing was scheduled 3 days after the children's removal but, according to the Appeals Court, the parents "agreed to waive" the 72-hour requirement because there was no interpreter and the father spoke little English. The hearing commenced a week later and was continued for several nonconsecutive days concluding almost three months later. Id. at 58. However, there was no evidence that the parents objected to the schedule nor did they seek relief under G.L. c.211, §3. Id. The Appeals Court concluded that the issue was moot any way, given that the case had proceeded to final judgment. Id.

DUE PROCESS - OPPORTUNITY TO BE HEARD

Care and Protection of Quinn, 54 Mass. App. Ct. 117 (2002) – Jacobs, Grasso, Cowin. See Parental Unfitness – Sufficiency of the Evidence.

See Privilege Against Self-Incrimination.

DUE PROCESS – OPPORTUNITY TO BE HEARD, INCARCERATED PARENT

Adoption of Whitney, 53 Mass. App. Ct. 832 (2002) – Lenk, Gillerman, Cohen. See Reasonable Efforts.

An incarcerated father appealed from a judgment terminating his parental rights and from the denial of his motion for a new trial on the basis that he had been denied a meaningful opportunity to be heard. The Appeals Court, relying on Adoption of Edmund, 50 Mass. App. Ct. 526 (2000) -- issued 2 weeks prior to the trial in this case -- vacated the decree and remanded the case to the Juvenile Court for the father to have an opportunity to testify and introduce other new evidence. Id. at 839.

The child was removed from the mother while the father was incarcerated in Maine. The Juvenile Court denied his motion for writ of habeas corpus and motion to order Maine to transport him to Massachusetts for hearings. Approximately five months after that denial, the case proceeded to trial without the father present, over the objections of father's counsel, and despite the father's anticipated release from prison some six months later.

In denying the father's Rule 60(b)(6) motion, the trial judge held Edmund distinguishable because the father in Edmund had "made more timely and persistent requests" to appear at trial. The Appeals Court disagreed, noting that the father, had made it perfectly clear before and during trial his desire to participate in the proceedings. Id. at at 837. The Appeals Court also rejected DSS's argument that the father received sufficient due process because his counsel participated at trial, several letters he had written while in prison in Maine were admitted in evidence, and his posttrial affidavit was considered by

the trial judge. "[T]hese simply do not constitute, in the circumstances, the requisite meaningful opportunity for the father to rebut the adverse evidence offered as to his fitness to parent Whitney." Id. at 838. The Court found the judge's failure to permit father to participate particularly problematic given that father's release from prison was imminent at the time of trial and the impact his release would have on his ability to parent his child. Id. at 838-839.

Unlike the father in Edmund, who remained incarcerated throughout the proceedings, the father in this case is no longer incarcerated, making him available to testify and also physically available to parent his child. As such, the Appeals Court held the father should have the opportunity to testify and to introduce other competent and relevant evidence. Id. at 839. (In Edmund, the remedy was the opportunity for the father to submit post-trial affidavits.)

DUE PROCESS – SUBPOENA FOR CHILD WITNESS

Adoption of Peggy, 436 Mass. 690 (2002) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Adoption – Dispensing With Parental Consent, Competing Plans; Appellate Practice – Preservation Of Appellate Issues; Evidence – Hearsay; Evidence – Hearsay, Medical & Hospital Records; Jurisdiction – Foreign Nationals; Parental Unfitness – Sufficiency Of The Evidence.

In a footnote, the SJC upheld the trial judge's decision to quash father's subpoena for the child to appear as a witness at the termination trial. Id. at 703 n.15. "In the circumstances of this case, the judge properly could have concluded that any such testimony could evince no evidence of probative value sufficient to outweigh the likelihood of further trauma to the child." Id.

EVIDENCE – AUTHENTICATION, OFFICIAL RECORDS

Commonwealth v. Deramo, 436 Mass. 40 (2002) – Marhall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy.

The SJC held that copies of public records must bear the original attestation to be admitted and that it was error for the trial judge to admit a copy of registry records containing a copy of the attestation. Id. at 49. At trial on charges of driving after his license was revoked, the prosecution sought to introduce into evidence a copy of the registry records that it had obtained from the police department. The records had been attested to by the proper official at the registry and then forwarded to the police, who made a copy and gave the copy to the prosecution. Separately, the clerk had obtained a copy directly from the registry that included the original attestation. The prosecution sought to admit the copy it had obtained from the police, which differed in an important respect from the clerk's copy. The prosecution's version contained a copy of a notice to the defendant that his license had been revoked while the clerk's copy did not contain this notice.

"The method of authenticating official written statements is almost always a matter of some precision. Statutes are specific in their requirements, and these requirements – involving attestations, certificates, affidavits, and seals – are rigidly insisted upon." Id. at 47 (citing Liacos, Massachusetts Evidence, § 8.13.3 at 545-546 (7th ed. 1999)). Whether through accident or deliberate tampering, a copy of a previously authenticated record may no longer be accurate or complete. Id. at 48. "The ease with which documents may be made to appear genuine by the use of modern technology only serves to underscore the need for proper attestation." Id. There must be "strict adherence to the requirements of attestation." Id. at 48. The attestation must be original, not a copy, and it must "pertain to the precise copy to which it is affixed." Id.

EVIDENCE – CHARTS AND SUMMARIES

Commonwealth v. Mimless, 53 Mass. App. Ct. 534 (2002) – Armstrong, Lenk, Rapoza.

The Appeals Court held that the trial judge properly admitting charts offered by the prosecution summarizing voluminous financial and other records. Id. at 538-540. Such charts "are permissible if they are accurate and fair, although care must be taken to insure that summaries accurately reflect the contents of the underlying documents and do not function as pedagogical devices that unfairly emphasize part of the proponent's proof." Id. at 538 (citations omitted). Assertions about inaccuracies in the charts go their weight and not their admissibility. Id. at 539-540.

PRACTICE TIP: Summary charts may be a useful way to present to the court voluminous DSS records, for example creating a time line of the child's placements, summarizing numerous service plans along with the parents' compliance or lack thereof, or creating a chart of parent-child visits from the social work narratives. Although the Mimless case speaks of the "admissibility" of such summaries, the general practice is to admit them as "chalks." Liacos, Massachusetts Evidence, § 11.13.2 at 731 (7th ed. 1999)). "Chalks are used to illustrate testimony and do not become a part of the record; they are not evidence in the ordinary sense of the word." Id.

EVIDENCE – COMPETENCY, CHILD WITNESS

Commonwealth v. Ike I., 53 Mass. App. Ct. 907 (2002) (rescript).

The Appeals Court held that defendant's counsel did not provide ineffective assistance by failing to request a voir dire on the competency of the victim, who was four at the time of the incident and five at the time of trial. The Court held that the trial record demonstrated both prongs of the competency test: (1) that the child understood the difference between truth and a lie and the general obligation to tell the truth; and (2) that the child had the

ability to perceive, remember, and relate his experiences. Id. at 908-909. As to the first prong, when asked if he understood the difference between truth and a lie, the child stated "I'm really five, and this is a lie: I'm six." During cross-examination, the child responded to a question by saying no one told him that what the defendant allegedly did to him was bad, but that it was bad because "God will punish you." The Court remarked that it would have been better had the judge asked the child a specific question whether he understood the consequences of telling a lie, but that the record was sufficient to conclude that he did understand. Id. at 909. As to the second prong, the Court noted that the child's trial testimony demonstrated "certainty with respect to the basic facts." Id.

EVIDENCE - EXPERT TESTIMONY, NEED FOR EXPERT WITNESS

Adoption of Vidal, 56 Mass. App. Ct. 916 (2002) (rescript). See Evidence – Hearsay, Official/Public Records; Parental Unfitness – Sufficiency of the Evidence.

Expert testimony regarding mother's mental health was not necessary for the trial judge to find that mother was mentally ill. Id. at 917. Evidence of mother's aberrant conduct and reports of episodes of mental illness were sufficient to support the finding that the mother experienced periodic episodes of mental illness. Id.

EVIDENCE – EXPERT TESTIMONY, PROFILE/SYNDROME

Commonwealth v. Poitras, 55 Mass. App. Ct. 691 (2002) – Laurence, Mason, Doerfer.

The Appeals Court reversed the defendant's convictions, holding that the trial judge erred in admitting expert testimony regarding the typical attributes and characteristics of people most likely to sexually abuse children. Id. at 694. The prejudice to the defendant was particularly great where the expert's description virtually mirrored characteristics about the defendant and where the case rested exclusively on the victim's testimony. Id. at 694-695.

Adoption of Fran, 54 Mass. App. Ct. 455 (2002) – Kantrowitz, Cowin, McHugh. See Guardian Ad Litem – Conflict of Interest; Parental Unfitness – Sufficiency Of The Evidence; Separation Of Church & State; Trial Practice – Oath.

The Appeals Court held that the testimony of a guardian ad litem concerning the family's participation in a cult was not impermissible profile evidence. Id. at 464-465. The GAL's report discussed the typical behaviors of cults generally and the specific behaviors of the cult to which the family belonged and the impact of those behaviors on the children. Id. at 465. Impermissible profile testimony is evidence that an individual is likely to have committed a specific past act because he or she possesses particular

characteristics common to a group. Id. Here the GAL did not opine that the parents had engaged in any specific behavior, but instead used facts about the group's behavior "to reach conclusions about the group's nature and likely future course." Id. at 465.

EVIDENCE – EXPERT TESTIMONY, RELIABILITY

Commonwealth v. Goodman, 54 Mass. App. Ct. 385 (2002) – Laurence, Gillerman, Grasso.

At issue in this case was whether expert testimony introduced by the Commonwealth regarding the cause of a fire was sufficiently reliable to be admissible under the Daubert/Lanigan test. The witness's opinion was based on personal observation of the site, conducted according to standards promulgated by the National Fire Protection Association. The Court stated that while reliability can be established by general acceptance in the scientific community, peer review or testing, "establishing the reliability of personal observations may in some circumstances *require examining other criteria*." Id. at 391 (citing Canavan's Case, 432 Mass. 304, 314 n.5 (2000)). The Court concluded that in matters which "depend so heavily on common sense observations, not on a hypothesis for explaining phenomena as in esoteric scientific theory," a judge may rely on his own common sense, as well as the expert's qualifications, in evaluating the reliability of the expert's opinion. Id.

EVIDENCE – EXTRAJUDICIAL INFORMATION

Care and Protection of Georgette, 54 Mass. App. Ct. 778, further app. rev. granted in part, 437 Mass. 1110 (2002) -- Porada, Laurence, Kafker. See Appellate Practice – Preservation of Appellate Issues; Parental Unfitness – Sufficiency of the Evidence; Visitation – Post-trial Visitation.

[**Note**: The SJC is reviewing other issues raised by Georgette concerning the role of child's counsel, conflicts of interest in the representation of multiple clients, and standards for relief from ineffective assistance of counsel. See the winter 2003 CAFL newsletter for a discussion of those issues. The portions of Georgette discussed in these case summaries will not be reviewed by the SJC.]

In Georgette, the father argued that the trial judge had improperly relied on extrajudicial information based on comments the judge made on the first day of trial that he had prepared by spending several hours reading documents related to the case. The Appeals Court rejected father's argument on the merits because it failed to recognize that the judge had presided over the proceedings for over five years and "the judge was almost surely referring to documentary evidence that had previously been generated, presented, or admitted during the long drawn-out proceedings." Id. at 783. Further, the Court noted that "it was virtually certain" that the allegedly extrajudicial information was eventually admitted during the trial. Id. The Court expressly rejected the father's argument that the judge was required to proceed from a "blank slate," i.e., that the judge could only

consider evidence introduced at the termination trial, stating that it was contrary to settled authority. Id. at 783 n.7 (citing Adoption of Frederick, 405 Mass. 1, 12 (1989); Adoption of Carla, 416 Mass. 510, 516 n.6 (1993); Custody of a Minor, (No. 2), 22 Mass. App. Ct. 91, 94 (1986); Care and Protection of Isabelle, 33 Mass. App. Ct. 548, 551-552 (1992)).

PRACTICE TIP: This holding is troubling because it suggests the judge in a termination trial may consider and rely upon documents or testimony that were "generated, presented or admitted" prior to the trial. Under this broad reading, documents filed with the court but not introduced into evidence, such as social worker letters, could be relied upon by the judge in issuing his findings, even though no party had offered the documents into evidence at trial. Further, read broadly the opinion leaves open the possibility that documents or testimony admitted at earlier proceedings such as a 72-hour hearing, abuse of discretion hearing or 29B hearing, could also be considered *sua sponte* by the judge. This raises profound due process issues as parents and children may not know what is in, or what is not in, evidence and consequently will be stymied in their efforts to make valid evidentiary objections or to offer testimony or documents to rebut the evidence against them. Additionally, it is not clear under the Appeals Court's ruling when during the course of the case counsel must raise objections to documents and testimony, either at the time they are presented or admitted or in motions in limine prior to trial.

None of the cases cited by the Appeals Court appear to support this broad view of care and protection cases as essentially "rolling trials" that begin upon the filing of the petition. Frederick, Carla and Isabelle all involved the admissibility in evidence in a termination trial of findings of fact issued in an earlier care and protection case and the 1986 Custody of a Minor case, concerned the admission of care and protection findings at a subsequent review and redetermination.

However, in In re Care and Protection Summons, 437 Mass 224, 235 (2002) the SJC stated that a judge holding parents in contempt for failing to produce the child in a care and protection case may rely on his findings in an earlier care and protection proceeding involving the parents' three other children, and may assess the parents' credibility in light of those proceedings. This decision, and Georgette, are a departure from settled law. For example, in Commonwealth v. O'Brien, 423 Mass. 841 (1997), the SJC held that in a juvenile transfer hearing a judge should not have relied on expert testimony that had been presented at an earlier bail hearing but was not introduced at the transfer hearing itself. Id. at 848-49. "A judge may not take judicial notice of facts or evidence brought out at a prior hearing that are not also admitted in evidence at the current hearing." Id. (citations omitted). "A judge's reliance on information that is not part of the record implicates fundamental fairness concerns." Id. at 841.

In light of these recent cases, counsel must know the practice in their courts regarding the use at trial of documents or testimony submitted, filed or admitted in evidence in pretrial proceedings. Where necessary, counsel should file a motion seeking clarification of what the judge intends to rely on as evidence. When stipulating to the admission of evidence at pretrial proceedings, counsel should consider whether to limit the stipulation to that proceeding and expressly reserve the right to make all proper objections at the trial. If practicing in a court where documents are deemed "admitted" prior to the actual trial,

counsel must be vigilant in objecting or preserving the right to object, to inadmissible evidence.

The Court also dismissed father's argument that comments and questioning made by the judge during the trial demonstrated the judge's bias against the father which was allegedly caused by the unidentified extrajudicial information. Id. at 783 n.8. In addition to being "speculation upon speculation," father's argument failed because the judge's comments and questioning did "not reveal a closed mind but rather permissible, active judicial engagement in the fact-finding process." Id. (citations omitted).

EVIDENCE – FINDINGS FROM EARLIER PROCEEDING

In re Care and Protection Summons, 437 Mass 224 (2002) -- Marshall, Greaney, Spina, Sosman, Cordy. See Care and Protection; Contempt; Judicial Impartiality; Trial Practice – Oath.

In assessing the credibility of the parents, "the judge was entitled to rely, as he did, on his findings in earlier proceedings involving these parents, and to assess their credibility in light of those proceedings." Id. at 235

Adoption of Darla, 56 Mass. App. Ct. 519 (2002) – Kantrowitz, Kass, Mills. See Judicial Impartiality; Parental Unfitness – Sufficiency of the Evidence.

The trial judge properly admitted in evidence in this termination trial, his findings from an earlier termination proceeding involving the parents three older children. Id. at 520-522. The findings met all the criteria for admission: The parents had a compelling incentive to litigate at the earlier proceeding; the findings were relevant and material, and they were not stale. Id. at 521. Admission was proper even though the earlier findings were pending appeal at the time of trial. Id. Of course, the findings are not dispositive. Id. at 521-522. [Note that the findings at issue were affirmed in Adoption of Fran, 54 Mass. App. Ct. 455 (20020].

EVIDENCE – HEARSAY

Adoption of Peggy, 436 Mass. 690 (2002) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Adoption – Dispensing With Parental Consent, Competing Plans; Appellate Practice – Preservation Of Appellate Issues; Due Process – Subpoena for Child Witness; Evidence – Hearsay, Medical & Hospital Records; Jurisdiction – Foreign Nationals; Parental Unfitness – Sufficiency Of The Evidence.

The trial judge did not err in permitting a DSS social worker to testify regarding medical reports and conversations with a doctor and social worker in Colorado. Id. at 702. The DSS worker did not testify concerning the contents of those reports or conversations,

merely that she had received them and incorporated them into her 51B report. Id. at 702-703. "The §51B report itself was admissible to explain the genesis of the filing of the care and protection petition." The underlying facts about the child's injuries and the treatment provided that were contained in those reports was the subject of testimony by both the father and stepmother. Id. at 703.

EVIDENCE – HEARSAY, MEDICAL & HOSPITAL RECORDS

Adoption of Peggy, 436 Mass. 690 (2002) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Adoption – Dispensing With Parental Consent, Competing Plans; Appellate Practice – Preservation Of Appellate Issues; Due Process – Subpoena for Child Witness; Evidence – Hearsay; Jurisdiction – Foreign Nationals; Parental Unfitness – Sufficiency Of The Evidence.

The SJC rejected father's challenge to the admission of three medical reports concerning the child's injuries and treatment. Although they were not certified as required by G.L. c.233, §79, the surgeon who wrote the reports authenticated them during the course of his testimony, testified extensively on the subject, and was subject to cross-examination. Id. at 703. Thus, everything contained in the reports was corroborated by the doctor's testimony and any error in their admission was harmless. Id.

EVIDENCE – HEARSAY, OFFICIAL/PUBLIC RECORDS

Adoption of Vidal, 56 Mass. App. Ct. 916 (2002) (rescript). See Evidence - Expert Testimony, Need for Expert Witness; Parental Unfitness – Sufficiency of the Evidence.

In Vidal, the Appeals Court held that an assessment prepared by a DARE social worker is admissible under the official records exception to the hearsay rule. Id. at 916-917. The Court reasoned that DARE is under contract with DSS, and is required to provide assessments and reviews in conformity with DSS regulations, service delivery standards and policies, as would a DSS social worker. Id. at 916. The Court stated that "an assessment completed by one employed by an organization under contract with DSS is the functional equivalent of an assessment undertaken by a person employed directly by DSS." Id. The Court further noted that the author of the report testified and the mother had the opportunity to cross-examine her with respect to the report. Id. at 917. Thus more leeway may be given to material contained in the report "that smacks of opinion, evaluation or judgment." Id. at 917 n.4.

PRACTICE TIP: Under Vidal, a report prepared by a DSS contracted agency is admissible if the same report prepared by a DSS social worker would be admissible. DSS sometimes argues that if it contracts with an individual to perform an assessment or evaluation, such as a psychological evaluation or a bonding assessment, that report should be admissible under the official records exception. However, the official records exception permits the admission of primary facts. Adoption of George, 27 Mass. App. Ct. 265, 271-273 (1989). Some evaluation or judgment is admissible if the author is available for cross-examination. Id. at 274. However, a report that is primarily

evaluation, opinion and judgment does not qualify as a public record. See Burke v. Memorial Hosp., 29 Mass. App. Ct. 948 (1990) in which the Appeals Court held that employee performance evaluations, which "by their very nature consisted almost entirely of judgmental evaluations and opinions" were not admissible under the business records exception to the hearsay rule. See also Julian v. Randazzo, 380 Mass. 391, 393 (1980) (conclusion in police report, comprising investigating officer's opinion and recommendation, not admissible under official records' exception).

EVIDENCE – OPINION TESTIMONY OF LAY WITNESS

Commonwealth v. Orben, 53 Mass. App. Ct. 700 (2002) – Beck, Cypher, Mason.

On appeal of defendant's OUI conviction, the Appeals Court affirmed the admission of a lay witness's testimony that "she was concerned something was wrong" and that "she had a funny feeling" the defendant was drunk. Id. at 703-704. The defendant had argued that the testimony was improperly admitted because it was not based on firsthand knowledge but mere suspicion, and that it constituted improper opinion evidence of guilt. The Court disagreed, holding that the testimony was proper lay opinion, albeit in a summary form, that the defendant was intoxicated. Id. at 704. "A lay person may provide an opinion, in a summary form, about another person's sobriety, provided there exists a basis for the opinion." Id.

FAIR HEARING – BURDEN OF PROOF

Covell v. Dep't of Soc. Servs., 54 Mass. App. Ct. 805, further app. rev. granted, 437 Mass. 1110 (2002) -- Lenk, Cowin, McCue. See Fair Hearing – Substantial Evidence.

Plaintiff appealed the inclusion of his name on the registry of alleged perpetrators after the Superior Court upheld the decision of the hearing officer. The Appeals Court reversed, holding that the hearing officer's decision was not supported by substantial evidence. Id. at 816. In reaching its decision, the Court noted that there is confusion with regards to who has the burden of proof. DSS cannot list a person on the registry unless there is substantial evidence to support the decision, suggesting that DSS has the initial burden of proving the underlying facts. Id. at 809. However, at the fair hearing DSS regulations require the listed individual to prove by a preponderance of the evidence that the decision was not in conformity with department regulations or policy or that the department acted without a reasonable basis or in an unreasonable manner. Id. at 808 (citing 110 CMR §10.23 (1993)). The Court stated that it may be permissible to require an appellant to demonstrate the agency committed an error of law, including demonstrating that its decision was not supported by substantial evidence. Id. at 809. However, the Court suggested that it may violate due process to require an appellant to produce evidence and persuade the fact finder of his innocence. Id.

FAIR HEARING – SUBSTANTIAL EVIDENCE

Covell v. Dep't of Soc. Servs., 54 Mass. App. Ct. 805, further app. rev. granted, 437 Mass. 1110 (2002) -- Lenk, Cowin, McCue. See Fair Hearing – Burden of Proof.

Plaintiff appealed the inclusion of his name on the registry of alleged perpetrators after the Superior Court upheld the decision of the hearing officer. The Appeals Court reversed, holding that the hearing officer's decision was not supported by substantial evidence. Id. at 816. A decision to support a 51A will stand if there is reasonable cause to believe a child was abused or neglected by a caretaker. Id. at 811. However, DSS may only list an individual in the registry of alleged perpetrators if there is "substantial evidence" of abuse or neglect. Id. at 808. Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 813 (citing G.L. c.30A, §1(6); 110 CMR §4.37 (1996)). There is no single measure of the amount of evidence necessary to satisfy the substantial evidence test. Id. at 813. The more important the decision, the greater the quantum of proof required to support it. Id. The hearing officer's decision in this case is of considerable significance, and thus the substantial evidence to support it "must be defined accordingly." Id. at 813-814.

The evidence supporting the hearing officer's decision was exclusively the hearsay statements of the plaintiff's stepdaughter that he had sexually abused her. Id. at 814. (The child testified at the criminal trial in which the Plaintiff was acquitted.) Substantial evidence may be based on hearsay testimony. Id. The question is whether the hearsay is reliable. Id. "[R]eliability must be judged in relation to the significance of the decision being made." Id. Since the child did not testify, the hearing officer could not assess her credibility. Id. at 815. "That the investigator may have been credible when reporting the hearsay does not mean ipso facto that the declarant was credible or that the hearsay was reliable. Furthermore statements "do not attain trustworthiness through a process of repetition" Id. at 815 (citing Edward E. v. Dep't of Soc. Servs., 42 Mass. App. Ct. 478, 486 (1997)). All that is present here is the unsubstantiated allegations of the child made 1 ½ years after the incident, under circumstances suggesting the possibility of fabrication or exaggeration. Id. at 816. "Reasonable minds do not accept such evidence as adequate to support a conclusion of this consequence." Id. (citing Arnone v. Comm'r of the Dept. of Soc. Servs., 43 Mass App Ct 33, 37 (1997)).

GUARDIAN AD LITEM – CONFLICT

Adoption of Fran, 54 Mass. App. Ct. 455 (2002) – Kantrowitz, Cowin, McHugh. See Evidence – Expert Testimony, Profile/Syndrome; Parental Unfitness – Sufficiency Of The Evidence; Separation Of Church & State; Trial Practice – Oath.

A nationally recognized cult expert was appointed as a guardian ad litem to conduct an investigation and determine whether the children's best interests would be served by returning them to their parents, who lived in a cult. The Appeals Court expressed concern about the "common" practice of appointing GALs with expertise in a particular area of concern about parental unfitness because it can "conflate the expert's role as an assessor of parental behavior and his or her role as a thoughtful investigator of the children's best interests." Id. at 465 n.15. The better practice is to appoint an independent GAL to evaluate the child's best interests that can consider, but is not "inextricably bound" by, the expert's opinions regarding the parents' behavior and abilities. Id.

JUDICIAL IMPARTIALITY

In re Care and Protection Summons, 437 Mass 224 (2002) -- Marshall, Greaney, Spina, Sosman, Cordy. See Care and Protection; Contempt; Evidence – Findings From Earlier Proceeding; Trial Practice – Oath.

The SJC held that a juvenile court judge in a care and protection case did not abuse his discretion in declining to recuse himself. Id. at 239. The parents appealed judgments of contempt entered against them, arguing that the judge was biased based on the judge's statements and rulings in an earlier care and protection involving the parents' older children. The SJC noted that the parents did not request the judge recuse himself at the outset as they should have, instead waiting until after several court hearings and the first contempt judgment had been entered against them. The parents' "belated request suggests a tactical decision in the face of an adverse ruling." Id. at 239 (citations omitted).

Further, any alleged bias was not the result of an extrajudicial source. Id. Generally, opinions held by a judge that result from an earlier proceeding are not considered "bias" requiring recusal. Id. at 240 (citations omitted). "Although it is possible that an unfavorable disposition could develop during prior proceedings, where that disposition is not "so extreme as to display clear inability to render fair judgment," it does not warrant recusal for bias. Id. In this case, the judge's actions in the prior care and protection were affirmed on appeal. Id. at 240 (see Adoption of Fran, 54 Mass. App. Ct. 455 (2002)).

Adoption of Darla, 56 Mass. App. Ct. 519 (2002) – Kantrowitz, Kass, Mills. See Evidence – Findings From Earlier Proceeding; Parental Unfitness – Sufficiency of the Evidence.

The Court rejected the parents' claim that the judge was biased against them based on his involvement in earlier proceedings involving other children. Id. at 522. [Those proceedings are discussed in Adoption of Fran, 54 Mass. App. Ct. 455 (2002) and In re Care and Protection Summons, 437 Mass 224 (2002).] The parents failed to raise their concern at the beginning of this case, and "their belated request suggests a tactical

decision in the face of an adverse ruling." Darla, 56 Mass. App. at 522 (citing In re Care and Protection Summons, 437 Mass. at 239).

Care and Protection of Georgette, 54 Mass. App. Ct. 778, further app. rev. granted in part, 437 Mass. 1110 (2002) -- Porada, Laurence, Kafker. See Appellate Practice – Preservation of Appellate Issues; Evidence – Extrajudicial Information; Parental Unfitness – Sufficiency of the Evidence; Visitation – Post-trial Visitation.

[**Note**: The SJC is reviewing other issues raised by Georgette concerning the role of child's counsel, conflicts of interest in the representation of multiple clients, and standards for relief from ineffective assistance of counsel. See the fall/winter 2002/2003 CAFL newsletter for a discussion of those issues. The portions of Georgette discussed in these case summaries will not be reviewed by the SJC.]

See Evidence – Extrajudicial Information.

JURISDICTION – FOREIGN NATIONALS

Adoption of Peggy, 436 Mass. 690 (2002) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Adoption – Dispensing With Parental Consent, Competing Plans; Appellate Practice – Preservation Of Appellate Issues; Due Process – Subpoena for Child Witness; Evidence – Hearsay; Evidence – Hearsay, Medical & Hospital Records; Parental Unfitness – Sufficiency Of The Evidence.

The SJC held that a juvenile court has jurisdiction to terminate a father's parental rights where both the parent and the child are foreign nationals and the father is living in the United States on a temporary work (i.e., nonimmigrant) visa. Id. at 691. Jurisdiction over the matter arises because the child is living in Massachusetts and because of her obvious need for care and protection. Id. at 698. There is nothing in chapter 119 to limit the court's jurisdiction depending upon the immigration status of the child. Id. The SJC rejected the father's argument that jurisdiction violated federal law. Id. The Court noted that federal immigration law specifically recognizes the jurisdiction of state juvenile courts over abused and neglected children. Id. at 699 (citing 8 U.S.C. §1101(a)(27J); Zhen-Hua Gao v. Jenifer, 185 F.3d 548, 554 (1999)).

The Court also held that jurisdiction did not violate international law. The Convention on the Rights of the Child is not binding on Massachusetts courts because it has not been ratified by the U.S. Even if it were binding, termination of the father's rights in this case was consistent with the Convention's principals. Id. Article 3 provides that the child's best interests should be the primary consideration in judicial proceedings, and Article 19 provides that parties to the convention should protect children from parental abuse. Id. at 699-700. Finally, the Court held that the department's plan for adoption by the child's foster parents did not violate Article 21 of the Convention. While stating a preference for placement in the child's country of origin, Article 21 provides that the paramount consideration must be the best interests of the child. Id. at 700.

PARENTAL UNFITNESS – SUFFICIENCY OF THE EVIDENCE

Adoption of Peggy, 436 Mass. 690 (2002) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Adoption – Dispensing With Parental Consent, Competing Plans; Appellate Practice – Preservation Of Appellate Issues; Due Process – Subpoena for Child Witness; Evidence – Hearsay; Evidence – Hearsay, Medical & Hospital Records; Jurisdiction – Foreign Nationals.

There was clear and convincing evidence of father's unfitness. Id. at 701-704. The child had suffered severe physical abuse while in the sole custody of her father and stepmother. Id. at 704. The medical evidence showed that upon admission to the hospital she suffered from genital mutilation, a subdural hematoma, swollen eyes, multiple injuries to the fingers of both hands, a chronic injury to one ear, and bruising on her back and shoulder. Id. at 695. The SJC also noted that there was no evidence that the abuse would not continue if returned home, and that the child had formed a strong positive bond with her foster parents, who wished to adopt her. Id. at 704.

Adoption of Vidal, 56 Mass. App. Ct. 916 (2002) (rescript). See Evidence - Expert Testimony, Need For Expert Witness; Evidence – Hearsay, Official/Public Records.

There was clear and convincing evidence of mother's unfitness, including "her history of violence, the shortcomings of her visits with her children, her failure to successfully address her needs and the needs of her children, the chaos and unsafe conditions of her home, her failure to successfully complete her service plan, her lack of a support network, and her manifestations of mental illness." Id. at 917.

Adoption of Darla, 56 Mass. App. Ct. 519 (2002) – Kantrowitz, Kass, Mills. See Evidence, Findings from Earlier Proceeding; Judicial Impartiality.

The Appeals Court concluded that there was clear and convincing evidence of the parents' unfitness, including the parents' failure to visit the child, the circumstances surrounding the death of another of their children at birth, their involvement in the death of another child (not theirs), their failure to obtain medical care for their older children, and their lack of understanding of the consequences of their actions. Id. at 522. [For a full discussion of the facts see Adoption of Fran, 54 Mass. App. Ct. 455 (2002) and In re Care and Protection Summons, 437 Mass 224 (2002).]

Adoption of Roni, 56 Mass. App. Ct. 52 (2002) – Brown, Cohen, Green. See Confrontation Of Witnesses – Child's Testimony, Alternatives To "Face To Face" Confrontation; Due Process – Delay Of Proceedings, 72-Hour Hearing; Reasonable Efforts.

The Appeals Court concluded that there was clear and convincing evidence that the parents were unfit. Id. at 58. The bulk of the evidence involved the testimony of the two

sisters regarding incidents of physical abuse including pulling hair, hitting them with various objects and forcing them to squat for hours. Id. at 54. The trial judge found the children's testimony extremely credible and concluded that the incidents described by the children warranted termination of parental rights. Id. at 58. The Appeals Court rejected the parents' argument that they were subjected to cultural bias, noting that there was no evidence that the abuse inflicted on the children was considered appropriate in their home country of Taiwan, and that the only evidence was to the contrary. Id.

Adoption of Lenore, 55 Mass. App. Ct. 275 (2002) – Greenberg, Cowin and McHugh. See Reasonable Efforts; Visitation – Post-Adoption Visitation.

The Appeals Court upheld the conclusion of the trial judge that there was clear and convincing evidence of the parents' unfitness and that there was a nexus between the parents' cognitive limitations and harm to the child. Id. at 281. The father had an IQ of about 50 and the mother also had some (unspecified) cognitive deficits. The parents had never been able to live independently or hold a job, and they showed little awareness of their own disabilities. Id. Both parents received SSI and the mother's father was her representative payee and handled her finances. Id. at 281-282. At the time their child went into foster care at 10 weeks of age, the child had been living with the parents and other relatives in unsanitary conditions. Id. at 281. The father's trial testimony demonstrated a "complete lack of awareness of the world around him…." Id. The Department's expert testified that there were no services available that could assist the parents to become competent parents, and the parents' expert, while criticizing the methodology of the DSS expert, did not suggest any services for the parents. Id. at 282. Further, the parents' expert agreed that there were concerns about the parents' ability to care for themselves, and that the ability to care for oneself is an important quality for caring for a young child. Id.

Care and Protection of Georgette, 54 Mass. App. Ct. 778, further app. rev. granted in part, 437 Mass. 1110 (2002) -- Porada, Laurence, Kafker. See Appellate Practice – Preservation of Appellate Issues; Evidence – Extrajudicial Information; Visitation – Post-trial Visitation.

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The Appeals Court affirmed judgments finding the father unfit, terminating his parental rights with respect to two of his children, and placing three others in the permanent custody of DSS. Id. at 781-782 & n.4. Among other things, the Court noted that the father persistently failed to provide for the children's basic needs, he was uninvolved with his children for long periods of time, he had a criminal history which included assaults, he had a history of violence against the mother and the children, he had a longstanding dependence on alcohol, he sexually abused two of his daughters, he failed to comply with

offered services, and he behaved inappropriately during supervised visits with the children. Id. at 781 n.4. The Appeals Court rejected the father's argument that the evidence was too stale to support a finding of unfitness. Id. at 784. It was proper for the judge to rely on past patterns of neglect, abuse and misconduct in assessing the father's present and future parenting capacity. Id. Further, evidence was introduced concerning father's continuing unfitness up to or near the time of trial. Id.

Adoption of Fran, 54 Mass. App. Ct. 455 (2002) – Kantrowitz, Cowin, McHugh. See Evidence – Expert Testimony, Profile/Syndrome; Guardian Ad Litem - Conflict; Separation Of Church & State; Trial Practice – Oath.

The Appeals Court rejected the father's challenges to certain subsidiary findings made by the trial judge and to the ultimate finding of unfitness. At the time the C&P was filed, the parents and three children were living in a group of two interrelated, extended families, who, among other things, shunned medicine and school. There was evidence that a child of the parents had died during childbirth, and that the young child of another couple had starved to death based on a religious vision by a group member that the child should be fed only water and breast milk.

The father argued that he should not be held responsible for the death of the other baby because he was not acting in loco parentis. The Appeals Court disagreed, noting that there was much evidence that the group shared responsibility for the children's activities and behavior, and that the evidence warranted the inference that the father knew about the child's deterioration and death. Id. at 460-461. Even if he was not directly responsible as one of the child's caretakers, his failure to intervene was relevant to determining unfitness, particularly where he testified that he would not seek medical care for his own children if faced with a life-threatening situation. Id. at 460 & n.11. The Appeals Court also affirmed the trial judge's finding that the children were physically abused and that there medical needs would continue to be neglected if returned to their parents. Id. at 461-462. Although the Appeals Court disagreed with the trial judge's finding that the father had abandoned the children as defined in chapter 210, the Court concluded that the children were abandoned in fact, if not law, where the parents refused to visit or communicate with the children while they were in foster care. Id. at 462-463. The Appeals Court concluded that there was clear and convincing evidence of the father's unfitness. Id. at 463-464.

Care and Protection of Elaine 54 Mass. App. Ct. 266 (2002) – Laurence, Kaplan, Dreben.

A father and three children successfully appealed a finding of parental unfitness. The father, 69 at the time of trial, had serious kidney problems, lacked adequate housing, and had had little contact with the children over the last 2 to 3 years. If the children were to be placed with him, he planned to move in with a friend until he could find more suitable housing arrangements.

The trial judge found father unfit and committed the children to the custody of the department, but denied the petition to terminate parental rights. The judge based his decision in part on the father's age, health, and lack of prior experience parenting the subject children, but mainly on the father's lack of plans for stable housing for the children. The Appeals Court held this was insufficient to establish clearly and convincingly that the father was unfit. Id. at 272. In particular, the Court noted that although DSS was unsatisfied with the father's plans for housing, the father had done everything DSS asked and DSS had not given him feedback on what more was required. Id. at 273. Further, DSS failed to assist the father with his search for housing beyond providing him with a list of places to call, and would not help father obtain a Section 8 voucher because its plan for the children was adoption not reunification. The Court held that DSS may not refuse to provide reunification services "because in its view, without any adjudication or supportable factual basis, adoption is the department's desired objective." Id. at 273-274. The Court also criticized DSS for taking the "anomalous and incorrect position" that because the father had been found unfit, it did not need to investigate the father's current living arrangements, even though the judge had denied the petition to terminate parental rights. Id. at 274.

Care and Protection of Quinn, 54 Mass. App. Ct. 117 (2002) – Jacobs, Grasso, Cowin. See Privilege Against Self-Incrimination.

The Appeals Court affirmed the finding of the trial judge that father was presently unfit. Id. at 127. There was evidence that the father (who did not testify at trial) had beaten his son and another child with his fists and a cable cord, resulting in injury to the children. Id. at 125. He admitted to the investigators that this was his usual means of punishing his children and did not think it excessive. Id. He had a criminal record which included acts of violence. Id. at 125-126. Although he had attended a batterers' intervention program and parenting classes, there was no evidence that his attitude towards corporal punishment had changed. Id. at 125-126. The judge was not required to assume that his parenting skills had improved simply because he cooperated with the department. Id. at 126-127 (citing Adoption of Lorna, 46 Mass. App. Ct. 134, 143 (1999)).

Adoption of Olivia, 53 Mass. App. Ct. 670 (2002) – Gillerman, Cypher, Cohen. See Appellate Practice – Dismissal of Appeal, Mootness; Counsel, Right to Counsel.

On appeal by father of a probate court judgment dispensing with consent to adoption of his two younger children, the Appeals Court held that there was clear and convincing evidence of father's unfitness and that the trial judge properly considered the statutory factors bearing on father's fitness. Id. at 677-678. Among other things, the court considered the following: the father was violent towards the children and the mother; the children witnessed verbal and physical abuse between their parents; both parents had long term-substance abuse problems; father was incarcerated for assault with intent to kill the mother; the father refused to believe that the children had been sexually assaulted by their older brother and hoped to reunite all three children upon his release from prison; the children are attached to and wish to be adopted by their preadoptive parents; and the

father is unable to meet the children's special needs and does not appreciate the psychological damage they have suffered. Id.

Adoption of Natasha, 53 Mass. App. Ct. 441 (2001) – Brown, Cypher, Kafker.

See Conflict Of Interest, Department Of Social Services.

PRIVILEGE AGAINST SELF-INCRIMINATION

In re Care and Protection Summons, 437 Mass 224 (2002) -- Marshall, Greaney, Spina, Sosman, Cordy. See Care and Protection; Contempt; Evidence – Findings From Earlier Proceeding; Judicial Impartiality; Trial Practice – Oath.

See Contempt.

Care and Protection of Quinn, 54 Mass. App. Ct. 117 (2002) – Jacobs, Grasso, Cowin. See Parental Unfitness – Sufficiency of the Evidence.

The trial judge did not err in denying father's request to continue the care and protection trial pending the resolution of criminal complaints resulting from the alleged abuse of his son. On the day of trial, father asked for a continuance pending resolution of the criminal case, which was denied. The trial judge also denied his request to testify regarding his parenting abilities while asserting his privilege against self-incrimination with respect to the subject matter of the criminal case. The Appeals Court affirmed. Id. at 118.

The father argued that he was improperly forced to choose between his right to participate fully and effectively in the custody proceeding, and his constitutional right not to give testimony that might be used against him in the criminal proceeding. However, it is settled law that the privilege against self-incrimination does not apply in care and protection cases, *i.e.*, an individual may refuse to testify but the judge may draw a negative inference. Id. at 121 (citing Custody of Two Minors, 396 Mass. 610, 617 (1986)). There is no right to a continuance, and no requirement that the civil proceeding yield to the criminal one. Id. at 122 (citing) United States Trust Co. of N.Y. v. Herriott 10 Mass. App. Ct. 313, 316 (1980)).

The father's request for a continuance was within the discretion of the judge. Id. at 121. In exercising his discretion, a judge should balance the prejudice to the other parties against the potential harm to the party claiming the privilege. Id. at 122. Here, the balance weighed in favor of denying the continuance. Id. The father made the request orally on the day of trial without an accompanying affidavit. The children clearly had an interest in a speedy resolution of the case. Id. Further, there was no evidence that the criminal case would conclude within a reasonable period of time, indeed the juvenile court judge was informed that the judge presiding over the criminal trial refused to go forward until the care and protection case was resolved. Id.

The father argued that failure to continue the trial prevented him from offering evidence concerning his improved parenting skills. However, the Appeals Court noted that this evidence could have been introduced through other witnesses and therefore the father had a meaningful opportunity to be heard. Id. at 122. The Court concluded that the judge did not abuse his discretion, particularly where this was not a termination case. Id. at 123. (Indeed, at the end of the decision the Court noted that the father was free to present additional evidence at periodic reviews under G.L. c.119, §26.)

Finally, the father argued that the trial judge impermissibly drew a negative inference from his failure to testify. While repeating the rule that a negative inference may be drawn in these cases, the Court concluded that in any event the judge's decision in this case did not rely on any such inferences. Id. at 123-124.

PRIVILEGED COMMUNICATION – BURDEN OF PROOF

Miller v. Milton Hosp. & Medical Ctr., 54 Mass. App. Ct. 495 (2002) – Perretta, Duffly, Green.

A party asserting a privilege has the burden to establish that it applies. Id. at 499.

PRIVILEGED COMMUNICATION – PSYCHOTHERAPIST-PATIENT PRIVILEGE

In re Laura L., 54 Mass. App. Ct. 853 (2002) – Brown, Greenberg, McHugh.

The Appeals Court held that statements made by an individual to a psychotherapist during a court-ordered examination may be admitted in a proceeding to involuntarily commit the person under G.L. c. 123, §12(e) only if the judge first finds that the person knowingly and voluntarily waived her privilege pursuant to Commonwealth v. Lamb, 365 Mass. 265 (1974). Id. at 858-860. In this case the mother of a child involved in a care and protection case in the Juvenile Court was arrested on a warrant and brought to court for an evaluation pursuant to G.L. c.123, §12(e). Although the evaluator testified that he gave her the Lamb warnings, he stated that she seemed to have difficulty understanding the warnings. The Appeals Court held that at this point the judge *sua* sponte should have made an inquiry into whether the mother actually understood and knowingly waived her rights. Id. at 858.

PRIVILEGED COMMUNICATION – SOCIAL WORKER-CLIENT

Commonwealth v. Pelosi, 55 Mass. App. Ct. 390 (2002) – Cypher, Kafker; Brown (dissenting).

See Privileged Communication – Waiver

PRIVILEGED COMMUNICATION – WAIVER

Commonwealth v. Pelosi, 55 Mass. App. Ct. 390 (2002) –Cypher, Kafker; Brown (dissenting).

The Court held that release to the defendant of 51A and 51B reports and a videotaped interview of the children by the district attorney's office, did not constitute a waiver of the children's privilege with respect to the children's DSS records and counseling records from MSPCC. Id. at 396.

In addition, the mother's consent to the release of records concerning the children prepared by a social worker at Harvard Community Health Plan, did not result in a waiver of the social work privilege in the MSPCC's counseling records. First, MSPCC is a completely separate entity. Id. at 397. Second, the mother apparently was not aware of the privilege at the time she signed the release. Id. Finally, the privilege protects communications. Although the HCHP records might cover the same subject matter as the MSPCC counseling records, release of the HCHP records does not create a waiver of other protected communications. Id. at 397 (citing Commonwealth v. Goldman, 395 Mass. 495, 499-500 (1985) (where a witness testifies about the underlying topic of a privileged communication there is no waiver, but where the witness testifies to the specific privileged communication, there may be a waiver); Commonwealth v. Clancy, 402 Mass. 664, 669 (1988) (witness who testified regarding mental health treatment did "not relinquish all protection by merely testifying to events falling within the subject matter of a privilege").

The dissent disagreed with the majority's holding regarding release of the HCHP records. Id. at 403-411. The dissent believed the factual record was insufficient to determine whether a valid waiver had occurred. Id. at 404, 409. The dissent also disagreed with the majority's reliance on the Goldman and Clancy cases. According to the dissent, those cases simply held that an individual does not waive privilege simply because he testifies about the same events that fall within the subject matter of the privileged communication. Id. at 408. According to the dissent, if the confidential communications contained in the HCHP records constitute a "significant part of the privileged matter" then the privilege would be waived "with respect to all recipients of that communication." Id. at 409.

The dissent also discussed the issue of who may waive the child's privilege, noting that if the interests of the children and mother diverged, a guardian would need to be appointed to protect the children's privilege. Id. at 410 (citing Adoption of Diane, 400 Mass. 196, 202 (1987)) The dissent also suggests that where a child is able "to engage in meaningful consultation about the merits of waiving a privilege," then the child may make that determination. Id. at 410-411.

REASONABLE EFFORTS

Adoption of Roni, 56 Mass. App. Ct. 52 (2002) – Brown, Cohen, Green. See Confrontation Of Witnesses – Child's Testimony, Alternatives To "Face To Face Confrontation; Due Process – Delay Of Proceedings, 72-Hour Hearing; Parental Unfitness – Sufficiency Of The Evidence.

The Appeals Court rejected the parents' argument that DSS failed to provide adequate opportunities for visitation and that as a result the children became attached to their foster parents. Id. at 59. The children's therapists had indicated that the children were apprehensive about visits. During one visit the father yelled at his daughter because she would not sit next to him, and both parents then left the DSS office. Id. While DSS could have provided more services to the parents, the primary problem was that parents refused to acknowledge the severity of their abusive behavior towards their children. Id.

Adoption of Whitney, 53 Mass. App. Ct. 832 (2002) – Lenk, Gillerman, Cohen. See Due Process – Opportunity To Be Heard, Incarcerated Parent.

A father incarcerated in Maine appealed from a decree dispensing with consent to adoption arguing that he was denied an opportunity to participate in the proceedings. In a footnote, the Appeals Court also criticized the Department's lack of efforts with regard to the father, noting that the social worker never sent the father a service plan, never inquired of his status while in prison in Maine, never contacted him and never offered him services. Id. at 838 n.5.

REASONABLE EFFORTS, DISABLED PARENTS

Adoption of Lenore, 55 Mass. App. Ct. 275 (2002) – Greenberg, Cowin and McHugh. See Parental Unfitness, Sufficiency of the Evidence; Visitation – Post-Adoption Visitation.

Two cognitively limited parents challenged a decree terminating their parental rights, arguing that DSS failed to make reasonable efforts to provides services to strengthen the family as required by G.L. c. 119, § 51B and 110 C.M.R 1.01 and 1.02. Id. at 277-78. At trial a psychologist hired by DSS testified that he knew of no services that would improve the mother and father's parenting skills. The parents' expert criticized the DSS expert's methodology but did not identify any alternative services that should reasonably have been provided.

The Appeals Court was critical of "deficiencies in the ardor with which DSS undertook its search for services," and mindful of the judge's role to "be vigilant" to ensure that DSS meets its obligation to match services with family needs. Id. at 279 & n.3. Nevertheless, the Appeals Court concluded that since the parents failed to identify services that DSS should have offered, "the trial judge was not clearly erroneous when he

found that no useful services existed." Id. at 279.

Care and Protection of Elaine 54 Mass. App. Ct. 266 (2002) – Laurence, Kaplan, Dreben.

See Parental Unfitness – Sufficiency of the Evidence.

SEPARATION OF CHURCH & STATE

Adoption of Fran, 54 Mass. App. Ct. 455 (2002) – Kantrowitz, Cowin, McHugh. See Evidence – Expert Testimony, Profile/Syndrome; Guardian Ad Litem - Conflict; Parental Unfitness – Sufficiency Of The Evidence; Trial Practice – Oath.

It was improper for the trial judge to make comments about his own religious orientation, and to make a factual finding that the cult to which father belonged engaged in "scripture twisting." Id. at 465 n. 15. The U.S. and Massachusetts constitutions prohibit courts from making judgments about the true meaning of scripture, and prohibit judges from interjecting their own religious sentiments while engaged in their official duties. Id.

TRIAL – CONTINUANCE

Care and Protection of Quinn, 54 Mass. App. Ct. 117 (2002) – Jacobs, Grasso, Cowin. See Parental Unfitness – Sufficiency of the Evidence.

See Privilege Against Self-Incrimination.

Adoption of Olivia, 53 Mass. App. Ct. 670 (2002) – Gillerman, Cypher, Cohen. See Appellate Practice – Dismissal Of Appeal, Mootness; Parental Unfitness, Sufficiency of Evidence.

See Counsel, Right To Counsel.

Commonwealth v. Carsetti, 53 Mass. App. Ct. 558 (2002) – Jacobs, Kantrowitz, Kafker.

See Counsel, Right To Counsel.

TRIAL PRACTICE – OATH

In re Care and Protection Summons, 437 Mass 224 (2002) -- Marshall, Greaney, Spina, Sosman, Cordy. See Care and Protection; Contempt; Evidence – Findings From Earlier Proceeding; Judicial Impartiality.

The parents chose to give their testimony by affirmation, instead of the traditional oath, as is permitted under G.L. c.233, §§17-19. It was improper for the judge to attribute less veracity to their testimony because they failed to take an oath. Id. at 240. However, there were numerous reasons for the judge to disbelieve the parents and any negative inferences he may have drawn from the parents' choice to affirm is insignificant. Id.

Adoption of Fran, 54 Mass. App. Ct. 455 (2002) – Kantrowitz, Cowin, McHugh. See Evidence – Expert Testimony, Profile/Syndrome; Evidence – Guardian Ad Litem; Parental Unfitness – Sufficiency Of The Evidence; Separation Of Church & State.

The father refused to swear the traditional oath to tell the truth on religious grounds. Rather than offering the father the opportunity to affirm as permitted by G.L. c.233, §18, the judge stated that the father could testify but his testimony may not carry the same weight. The father declined to testify and on appeal argued that the judge's actions chilled his right to testify on his own behalf. The Appeals Court held that reversal was not required here. Id. at 467-468. The Court held that it would have been better had the judge more fully explained the father's option to affirm, but that no reversal was required because: (1) the father made some statements to the judge at the time and at the close of evidence which one might infer were the substance of what he would have said had he testified, and (2) the father had repeatedly demonstrated that his value system was not dictated by the laws governing the rest of society and therefore, the judge could not be faulted for "ascribing a low probative value to what the father had to say."

VISITATION

Adoption of Olivia, 53 Mass. App. Ct. 670 (2002) – Gillerman, Cypher, Cohen. See Counsel – Right to Counsel; Parental Unfitness, Sufficiency of Evidence.

See Appellate Practice – Dismissal of Appeal, Mootness

VISITATION - POST-ADOPTION VISITATION.

Adoption of Lenore, 55 Mass. App. Ct. 275 (2002) – Greenberg, Cowin and McHugh. See Parental Unfitness, Sufficiency of the Evidence; Reasonable Efforts.

The Appeals Court affirmed the decision of the trial judge to leave post-adoption contact to the discretion of the adopting parents where there was little or no evidence of a significant bond with either parent. Id. at 284 (citing Adoption of Vito, 431 Mass. 550, 560 (2000)). The child had only lived with the parents for the first ten weeks of her life. Id. at 283. The father and mother did not establish a close relationship with the child while she was in foster care. Id. at 282. The child referred to them by their first names, and "did not particularly relish" the visits." Id. However, the Appeals Court criticized the trial judge for basing the visitation ruling in part on speculation that the child would

be embarrassed by her cognitively limited parents as she grew older. Id. at 283.

Adoption of John, 53 Mass. App. Ct. 431 (2001) – Duffly, Kantrowitz, McHugh. See Adoption – Dispensing With Parental Consent, Agreements for Judgment.

The trial judge left the question of post-adoption visits to the discretion of the prospective adoptive parents. The judge's only finding on this issue was ambiguous regarding whether there was a significant bond between the child and his parents, and whether post-adoption contact would be in the child's best interest. Id. at 439. The Appeals Court remanded in order for the trial court to determine whether a significant bond existed between the child and his parents that would be the basis for an order for post-adoption visitation. Id. at 439-440. "The issue was put before the judge and he was thus required to make a determination." Id. at 440.

VISITATION – POST-TRIAL VISITATION

Care and Protection of Georgette, 54 Mass. App. Ct. 778, further app. rev. granted in part, 437 Mass. 1110 (2002) -- Porada, Laurence, Kafker. See Appellate Practice – Preservation of Appellate Issues; Evidence – Extrajudicial Information; Parental Unfitness – Sufficiency of the Evidence.

[**Note**: The SJC is reviewing other issues raised by Georgette concerning the role of child's counsel, conflicts of interest in the representation of multiple clients, and standards for relief from ineffective assistance of counsel. See the winter 2003 CAFL newsletter for a discussion of those issues. The portions of Georgette discussed in these case summaries will not be reviewed by the SJC.]

The Appeals Court upheld the decision of the trial judge to leave the matter of visitation to the sound discretion of DSS where the judge made extensive findings regarding father's record of inappropriate behavior during visits, and where father could have but did not seek a review and redetermination with regard to visitation. Id. at 785 n.10.

VISITATION – SIBLING VISITATION

Adoption of Galvin, 55 Mass. App. Ct. 912 (2002) (rescript)

The District Court entered an order for posttermination and postadoption sibling visitation, which left to DSS to determine the frequency and condition of visits in the children's best interests. The judge reasoned that "it should not be the role of the court to 'micro-manage' such decisions, 'particularly when [DSS]' was available and 'ready to give all parties the benefit of its expertise in resolving on-going visitation issues.'" Id. at 913. The Appeals Court disagreed, remanding to the trial court, with orders to hold an evidentiary hearing on sibling visitation. According to the Appeals Court, "[t]he plain

language of [c. 119, §26(5)] requires the judge not only to consider whether sibling visitation should be ordered, given the practicalities of the situation and the best interests of the children in question, but also to decide how such visitation should be implemented." Id. The statute contemplates that the judge, not DSS, must in the first instance determine the appropriateness and schedule for visitation. Id. The judge is also statutorily mandated to hold periodic reviews of the sibling visitation schedule and, "implicitly, to make modifications as circumstances may change." Id. at 913-14. The Appeals Court acknowledged that its decision would require "significant" judicial involvement in sibling visitation matters for children in foster care. Id. at 914. However, "the statute's directive that the court set and periodically review the schedule, terms, and conditions of sibling visitation [was] clear," and "reflect[ed] a legislative judgment that such sensitive matters must be committed to a judge's neutral decision-making rather than being left to the discretion of parties." Id.

WITNESS – CREDIBILITY

In re Care and Protection Summons, 437 Mass 224 (2002) -- Marshall, Greaney, Spina, Sosman, Cordy. See Care and Protection; Contempt; Evidence – Findings From Earlier Proceeding; Judicial Impartiality; Trial Practice – Oath.

See Evidence – Findings from Earlier Proceeding.

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